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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Christopher Booher and Patricia Reid, individually, on behalf of others similarly situated, and on behalf of the general public,

Plaintiffs,

vs.

JetBlue Airways Corporation,

Defendant.

Case No. 4:15-cv-01203-JSW

**DEFENDANT JETBLUE AIRWAYS CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Date: May 19, 2017
Time: 9:00 a.m.
Courtroom: 5, 2nd Floor
Judge: Hon. Jeffrey S. White

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**SUMMARY OF ARGUMENT PURSUANT TO CIVIL STANDING ORDER ¶ 7**

In the past nine months, four different District Court judges in California have found that California Labor Code section 226 ("Section 226") does not apply extraterritorially to the work Flight Attendants ("FAs") and other similar, mobile workforces performed. *Oman v. Delta Air Lines, Inc.*, 2016 WL 66838 (N.D. Cal. Jan. 6, 2017); *Ward v. United Airlines, Inc.*, 2016 WL 3906077 (N.D. Cal. July 19, 2016); *Vidrio v. United Airlines, Inc.*, 2017 WL 1034200 (C.D. Cal. Mar. 15, 2017); *Shook v. Indian River Transport Co.*, 2017 WL 633895 (E.D. Cal. Feb. 15, 2017). There is no dispute that Plaintiffs did not principally work in California throughout their employment, or that Defendant JetBlue Airways Corporation ("JetBlue") lacks the necessary connections to California to justify Section 226's extraterritorial application. Accordingly, just as the other District Court judges found, this Court should grant JetBlue's summary judgment motion because there is no basis to apply Section 226's procedural protections to FAs.

Plaintiffs' theories would also require the improper, extraterritorial application of California's overtime law, because there is no dispute that Plaintiffs did not work more than eight hours in a day on the ground in California. California has no sovereignty over FAs traveling in the skies above it and, thus, California's wage and hour laws should not have followed Plaintiffs as they worked in the federal airspace. Plaintiffs also have not established that they were working throughout the time they were considered on duty for Federal Aviation Administration purposes and thus cannot prove they have in fact worked more than eight hours in a day in California.

Plaintiffs' Section 226 and overtime claims also should be dismissed because applying those laws to JetBlue's FA workforce would violate the Dormant Commerce Clause. Permitting California to regulate conduct occurring wholly outside of the state simply because Plaintiffs touched California would place an undue burden on interstate commerce and improperly project California law into other states. Moreover, requiring JetBlue to monitor the exact time and location of each FA's individual flights to determine which state's laws apply and how would create an excessive burden that vastly outweighs the putative local benefits.

Accordingly, JetBlue respectfully requests that Plaintiffs' Second through Sixth Claims for Relief be dismissed as a matter of law.

## I. INTRODUCTION

In their continuing effort to persuade this Court to impermissibly and unconstitutionally apply California Labor Code section 226 ("Section 226") to JetBlue's mobile Flight Attendant ("FA") workforce, Plaintiffs in their Opposition again rely on mischaracterizations of JetBlue's arguments and base their own assertions on fundamental misinterpretations and improper expansions of the law. However, Plaintiffs cannot evade that in the past nine months, three separate District Court judges in California have held that Section 226 does not apply to FAs and pilots, while a fourth held that the law does not apply to truck drivers engaged in interstate commerce. Nor can they dispute that Plaintiffs principally worked outside of California throughout their employment or that JetBlue lacks "deep ties" to California.

Plaintiffs invite this Court to disregard those decisions and improperly expand the California Supreme Court's limited holding in *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011) ("*Sullivan I*") beyond California's overtime provisions to find that Plaintiffs' performance of *any* work within California availed them to all of the protections, rights and remedies available under California law. Plaintiffs' overbroad reading of *Sullivan I* cannot save their claim. *Sullivan I* confirms that the District Court judges referenced above properly analyzed the plaintiffs' principal job site when determining whether the California Labor Code applied to them. This Court should follow this approach to find that Plaintiffs cannot rebut the presumption against the Labor Code's extraterritorial application and that Section 226 should not apply to Plaintiffs.

Plaintiffs similarly have failed to refute that applying Section 226 or California's overtime laws to JetBlue's mobile FA workforce would violate the Dormant Commerce Clause. To the contrary, their arguments – including those contrasting Reid from Booher – only underscore the far-reaching and unconstitutional implications if Plaintiffs' theories governed California law's application. That law may not dictate JetBlue's nationwide practices or supersede the competing and conflicting laws of the other states in which Plaintiffs worked. Nor may it require JetBlue to monitor the exact time and location of each FA's individual flights in real-time to determine which state's laws apply and how, creating an undue burden that vastly outweighs the putative local benefits.

Even if California daily overtime laws applied – and they do not – Plaintiffs have not established that they worked more than eight hours in a day in California. On each day for which Plaintiffs seek to recover daily overtime, Plaintiffs indisputably worked in the federal airspace. Neither California Labor Code section 510 ("Section 510") nor the Industrial Welfare Commission ("IWC") Wage Order apply extraterritorially to that time. Moreover, Plaintiffs have not met their burden of proof that they were working throughout those days while on duty.

For the reasons set forth below and in JetBlue's opening brief, JetBlue respectfully requests that Plaintiffs' Second through Sixth Claims for Relief be dismissed as a matter of law.

## II. SECTION 226 DOES NOT APPLY TO PLAINTIFFS BECAUSE THEY PRINCIPALLY WORKED OUTSIDE OF CALIFORNIA.

In the past nine months, three different District Court judges in California, including two in this District, have found that Section 226 cannot be applied extraterritorially to the work out-of-state airlines' FAs and Pilots performed, while a fourth judge similarly held that Section 226 did not apply to truck drivers engaged in interstate commerce. Whether those judges analyzed the plaintiffs' work on a pay period by pay period basis or over an extended period of time, the results were the same – Section 226 does not apply, because the plaintiffs did not principally work in California. *Oman v. Delta Air Lines, Inc.*, 2016 WL 66838, at *6 (N.D. Cal. Jan. 6, 2017) ("there is no basis to apply Section 226's procedural protections" to FAs because, in part, the plaintiffs only worked as much as 14 percent of their time in California); *Ward v. United Airlines, Inc.*, 2016 WL 3906077, at *5 (N.D. Cal. July 19, 2016) (holding that Section 226 did not cover pilots, including the California-based and resident plaintiff, who worked as much as 42 percent of their time *within a given pay period* in California); *Vidrio v. United Airlines, Inc.*, 2017 WL 1034200, at *6 (C.D. Cal. Mar. 15, 2017) (holding that Section 226 did not apply to FAs who spent approximately 80 percent of their time working outside of California); *Shook v. Indian River Transport Co.*, 2017 WL 633895, at *5 (E.D. Cal. Feb. 15, 2017) (holding that California-resident truck drivers whose routes began or ended in California, some of whom spent nearly half their work time *in particular pay periods* in California, did not principally work in California because they spent the majority of their time working outside California).

Here, there is no dispute that during the relevant time period – August 31, 2014 through her termination and addition to this case in the First Amended Complaint a year later[1] – Reid worked 75.6 percent of her hours outside of California and worked in non-California airports on 80.4 percent of her workdays. Dkt. 63-20 at 6.[2] While Plaintiffs criticize JetBlue's analysis for its focus on the statutory period for Reid's Section 226 claim, they do not provide an analysis of Reid's work hours for any other allegedly appropriate timeframe beyond a single pay period.[3] Moreover, Plaintiffs do not dispute or address that under the longest statute of limitations period available to Booher under any claim, he spent 83.2 percent of his hours working outside of California and worked in airports outside of California on 90 percent of his workdays. *Id.* Instead, Plaintiffs ask this Court to focus on single days and two individual pay periods for Reid only in which she purportedly worked solely in California, and find that those days and pay periods required JetBlue to treat Plaintiffs' entire employment as if it occurred in California regardless of where they actually worked. However, no matter the timeframe, the results are still the same: Section 226 cannot be applied extraterritorially and should not apply to Plaintiffs

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[1] To obtain a three-year statute of limitations period under Section 226(e), Plaintiffs were required to plead their request for "actual damages" with specificity. *Lopez v. Aerotek, Inc.*, 2015 WL 4504691, at *3, n. 4 (C.D. Cal. July 23, 2015). They have not. Plaintiffs' operative Second Amended Complaint, like the two previous versions of the Complaint, on its face demands solely "Wage Time ***Penalties*** (Cal. Lab. Code § 226)." Dkt. 34 at 1 (emphasis added). Plaintiffs' demand for purported lost wages under the California minimum wage and overtime laws under separate California Labor Code provisions does not trigger the extended statute of limitations period for their Section 226 penalties claim. *Rodriguez v. Old Dominion Freight Line, Inc.*, 2013 WL 6184432, at *6 (C.D. Cal. Nov. 27, 2013). Notably, Plaintiffs do not contend that Booher (or Reid) plead or sought recovery for actual damages under Section 226(e) in the Complaint. Dkt. 65 at 19, n.9. Moreover, even when provided an opportunity to define the scope of their Section 226 damages, Plaintiffs limit it to penalties. Dkt. 65 at 28 ("JetBlue's objection to reporting Plaintiffs' hours worked and rates of pay confirms its liability for ***statutory penalties***….JetBlue failed to provide the required information, and this protracted litigation is the result. JetBlue is liable for ***penalties*** under Section 226(e).") (emphases added). Accordingly, a one-year statute of limitations period should apply under Code of Civil Procedures section 340 to Reid's Section 226 claim and Booher's Section 226 claim should be time-barred and dismissed.

[2] All page citations to docket entries are to the ECF filed page.

[3] Plaintiffs also do not dispute that if Reid's claim tied back to the date Booher filed the initial Complaint – March 13, 2015 – she still worked outside California 70.9 percent of her hours and worked in airports outside California on 79.3 percent of her workdays between March 13, 2012 and August 31, 2015. Dkt. 63-20 at 6.

because they did not principally work in California.

Despite asking the Court to limit its focus to individual pay periods, Plaintiffs ignore the pay period example JetBlue provided. From September 1 through 15, 2014, Reid worked 52.4 hours, of which she worked 9.9 hours in Washington and 8.7 hours in California.[4] Dkt. 63 at 18, n. 11. Applying California law to the entire pay period simply because Reid worked some time in California would be an improper, extraterritorial application. Not only would California law govern the 83.4 percent of Reid's work performed outside the state, but it would also supersede the law of the state, Washington, in which she worked the most (excluding the federal airspace).[5]

Plaintiffs cannot rebut the presumption against the extraterritorial application of California law. Recognizing this, Plaintiffs base their "analysis" of Section 226 on the California Supreme Court's holding in *Sullivan I* regarding the application of California's overtime laws to out-of-state residents who *exclusively* worked more than eight hours in a day in California for a California-based employer. 51 Cal. 4th at 1199. Plaintiffs implore the Court to apply *Sullivan I* in a way the California Supreme Court never intended to find that Section 226 was triggered whenever Plaintiffs allegedly worked more than eight hours in a single day in California.

However, in *Sullivan I*, the California Supreme Court repeatedly noted that its decision regarding Section 510 did not extend to other California Labor Code provisions, and specifically avoided making any decision as to whether California could govern the content of an out-of-state

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[4] This pay period is not the one in which Reid worked the lowest percentage of her hours in California. For example, from March 16 through 31, 2015, Reid worked 5.97 hours out of 71.98 hours (8.3%) in California, and from December 16 through 31, 2013, she worked 6.37 hours out of 64.25 hours (9.9%) in California. Dkt. 63-9 at 59-60, 87-88. An analysis of Booher's flight records provides similar examples of a *de minimis* amount of time working within California, including: (a) 8 hours out of 148.35 hours (5.4%) from May 1 through 31, 2011 (*i.e.*, across two pay periods); (b) 3.52 hours out of 59.97 hours (5.9%) from July 1 through 15, 2011; and (c) 5.3 hours out of 77.85 hours (6.8%) from April 1 through 15, 2012. Dkt. 63-10 at 5-10, 24-26.

[5] In support of Plaintiffs' argument that the job situs test should not govern overtime coverage, they also identify two pay periods outside the Section 226 statute of limitations period in which Reid purportedly worked solely in California, including February 16 through 28, 2013, while failing to identify any similar pay period for Booher. Dkt. 65 at 13-14. As discussed below, a review of Reid's subsequent pay periods demonstrates the Dormant Commerce Clause implications of Plaintiffs' theory. *See infra* Section IV.

business's (such as JetBlue's) paystubs.[6] *Sullivan I*, 51 Cal. 4th at 1201; *Oman*, 2017 WL 66838, at *5. Indeed, there is nothing in *Sullivan I* or the Ninth Circuit's subsequent decision in *Sullivan v. Oracle Corp.*, 663 F.3d 1265, 1267 (9th Cir. 2011) ("*Sullivan II*"), requiring an employer to provide a Section 226-compliant wage statement whenever any work is performed within California "regardless of where the bulk of [an employee's] work in the relevant pay period is performed."[7] *Oman*, 2017 WL 66838, at *5.

Just as the plaintiffs did in *Oman*, Plaintiffs here ask the Court to read *Sullivan I* far too broadly. There is nothing incongruous between *Sullivan I* and the recent cases in which District Courts in California have analyzed the plaintiffs' job situs. *Sullivan I* did not reject or replace the job situs test the California Supreme Court set forth in *Tidewater Marine W. v. Bradshaw* through which the presumption that an employee is a California wage earner applies *only* if the employee "*works exclusively, or principally in California*." 14 Cal. 4th 577, 578 (1996) (emphasis added). Rather, *Sullivan I* held that employees who *exclusively* worked in California on a day or in a week (*i.e.*, *100 percent* of that day or week) for a California-based employer (Oracle) were eligible for daily and weekly overtime for the day or week in question if they worked the requisite hours. *Sullivan I*, 51 Cal. 4th at 1200. That is, Section 510 only covered the *Sullivan* plaintiffs because their "job situs" was California on those days and weeks.

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[6] In *Aguilar v. Zep Inc.*, Judge Orrick made clear that the "critical factor" for determining whether the California Labor Code applies to an employee is "where the work at issue is performed." 2014 WL 4245988, at *13-14 (N.D. Cal. Aug. 27, 2014). While Judge Orrick also noted that there was no reason to limit *Sullivan I* to overtime cases, the *Aguilar* decision did not analyze how *Sullivan I* would be applied to claims under Section 226, whether that Section would apply to employees, like Plaintiffs, who work in multiple jurisdictions throughout a given day, week or pay period, and, if so, how. Moreover, Judge Orrick's recent decision in *Oman*, in which he cited to *Aguilar*, demonstrates that he was unwilling to expand *Sullivan I* to Section 226 when applied to this same population of mobile workers, FAs. *Oman*, 2017 WL 66838, at **6-7.

[7] For example, Plaintiffs cite May 26, 2014. Dkt. 65 at 18. On that day, Reid was on duty 9.17 hours, including 1.9 hours in which she was on duty within the federally-regulated airspace. Dkt. 63-20 at 12. During that same pay period, Reid also was on duty in Nevada, Oregon and Washington. Dkt. 63-9 at 69-70. Nonetheless, Plaintiffs argue that because "Reid worked an 'entire day' in California without overtime. JetBlue failed to provide her with a compliant paystub for that day." Dkt. 65 at 18. Section 226 does not require JetBlue to provide individual wage statements for individual work days or to provide a California-compliant wage statement for the entire pay period simply because Plaintiff purportedly worked an "entire day" in California.

The Courts in *Oman*, *Ward*, *Vidrio* and *Shook* similarly analyzed where the respective plaintiffs principally worked in determining that Section 226 did not apply to their employment either in its entirety or on a pay period by pay period basis.[8] Even in *Bernstein v. Virgin America, Inc.*, Judge Tigar reviewed the percentage of time the plaintiffs worked in California, before discounting it in favor of several factors he felt established Virgin America's "deep ties" to California.[9] 2017 WL 57307, at *5 (N.D. Cal. Jan. 5, 2017). Regardless of what test this Court applies, where Plaintiffs principally worked is the primary factor, particularly because JetBlue is an out-of-state employer that prepares, issues and applies its FA policies from its New York headquarters and has minimal contacts with California. Because Plaintiffs cannot identify a single pay period within the statute of limitations period in which Reid (or Booher) principally worked in California, and there is no dispute that after August 31, 2014 Reid principally worked *outside* of California, neither Plaintiffs nor JetBlue have the necessary connections warranting the expansive, extraterritorial application of Section 226 for which Plaintiffs advocate.

[8] As evidenced by *Tidewater* and *Sullivan I*, federal and state courts in California factored an employee's principal work site into their analysis long before the *Ward* decision. *See Aguilar*, 2014 WL 4245988, at *13-14; *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1062 n. 1 (N.D. Cal. 2014) ("[T]he critical factor is where the work at issue is performed, and California's wage and hour laws do not apply to work performed primarily outside of California"); *Campagna v. Language Line Servs., Inc.*, 2012 WL 1565229, at *3 (N.D. Cal. May 2, 2012) ("None of the cases read California wage and hour laws to cover out-of-state work performed by nonresidents who primarily work outside California."); *Sarviss v. Gen. Dynamics Info. Tech., Inc.*, 633 F. Supp. 2d 883, 899 (C.D. Cal. 2009) (finding that a California resident who spent between eighty and ninety percent of his employment working outside of California was not a California wage earner because "the determinative issue is whether an employee principally works in California") (*citing Guy v. IASCO*, 2004 WL 1354300 (Cal. Ct. App. June 17, 2004) (unpublished)). Plaintiffs also mischaracterize the holdings in the recent cases. For example, *Vidrio* did not conclude only that residency and receipt of wage statements in California was "insufficient to obtain the benefits of California wage and hour laws" (Dkt. 65 at 21), but that in the absence of the "deep ties" the court in *Bernstein* found determinative, those factors were insufficient "***when the work is principally performed outside of the state***." 2017 WL 1034200, at *6.

[9] Plaintiffs do not ask this Court to rely on *Bernstein* other than for its analysis of the cases on which *Ward* relies despite being the *only* case finding that Section 226 applies to California-based and/or resident FAs. That is because it is undisputed that JetBlue does not share the "deep ties" to California that Judge Tigar found Virgin America had in *Bernstein*. Plaintiffs do not even feign to address the other factors Judge Tigar considered because the evidence confirms that each factor weighs in favor of finding that Section 226 did not apply to Plaintiffs. *See* Dkt. 63 at 9-10.

## III. SECTION 510 DOES NOT APPLY TO PLAINTIFFS BECAUSE THEY DID NOT WORK MORE THAN EIGHT HOURS IN A DAY IN CALIFORNIA.

Plaintiffs conflate JetBlue's arguments in their attempt to convince the Court that the job situs test is an impractical analysis for determining Plaintiffs' entitlement to overtime. However, whether California's overtime law applies to individuals depends on whether they work more than eight hours in a day or more than 40 hours a week *in California*, not whether they principally work in California over a broader period of time. Dkt. 63 at 21 (citing *Sullivan I*, 51 Cal. 4th at 1200). Plaintiffs' Section 510 claim does not fail because of some purported retroactive application of the job situs test; it fails because Plaintiffs cannot establish that they worked *in California* for more than eight hours unless the Court finds that Section 510 applies extraterritorially into the federally-regulated airspace.

Plaintiffs do not dispute that on each of the claimed overtime days they worked in the federal airspace. Instead, they argue that Ninth Circuit precedent permits California to regulate certain conduct within that airspace and that the law of the case doctrine precludes this Court from considering whether that airspace is within California territory. First, the Ninth Circuit's decision in *Skysign Intern., Inc. v. City & Cty. of Honolulu*, 276 F.3d 1109 (9th Cir. 2002), did not hold that the federal airspace above a state is considered part of that state's territory. Nor did it hold that any time spent working within the federal airspace above California shall be considered California work time for purposes of Section 510 (or any other California Labor Code provision). Rather, it held that federal regulations (including 49 U.S.C. § 40103(a)) did not preempt a local, Hawaiian ordinance governing advertising, particularly when the Federal Aviation Administration ("FAA") instructed the Hawaii-based provider of aerial advertising that it would be subject to all local laws and ordinances. *Id.* While the Fair Labor Standards Act's ("FLSA") Savings Clause permits states and municipalities to establish more generous overtime laws than the FLSA for employees working within those states and municipalities, it does not permit those states and municipalities to apply those laws to employees working in territories falling under the United States Government's exclusive sovereignty, such as the federally-regulated airspace and federal enclaves. *See* 29 U.S.C. § 218; 49 U.S.C. § 40103(a); *Taylor v.*

*Lockheed Martin Corp.*, 78 Cal. App. 4th 472, 478 (2000).

Second, this Court *denied* Plaintiffs' motion for partial summary judgment, including as to their overtime claim. *Booher v. JetBlue Airways Corp.*, 2016 WL 1642929, at *4 (N.D. Cal. Apr. 26, 2016). The Court has neither made a final determination as to Plaintiffs' overtime claim nor made a finding of fault or liability. Nonetheless, if the Court's directive to Plaintiffs to submit evidence of more than eight hours worked in California in a day is deemed the "law of the case," the Court has the "discretion to depart from the law of the case where…an intervening change in the law has occurred." *U.S. v. Alexander*, 106 F.3d 874 (9th Cir. 1997). As set forth in JetBlue's opening brief, Judge Orrick's recent *Oman* decision or the *Hirst v. SkyWest Airlines, Inc.* decision post-dated the Court's April 26, 2016 ruling, nor was 49 U.S.C. § 40103(a) or the 1958 Senate Report before this Court at the time of its prior ruling. Dkt. 63 at 27. That additional guidance supports that California has no sovereignty over FAs traveling in the skies above it and, thus, California's wage and hour laws, including Section 510, should not follow Plaintiffs as they worked in the federal airspace.[10] Because there is nothing in Section 510 or IWC Wage Order No. 9 that clearly expresses or reasonably infers any intent to apply extraterritorially as FAs work in the federal airspace and/or in airports in other states, Plaintiffs cannot overcome the presumption against the extraterritorial application of California's overtime laws.

## IV. REQUIRING JETBLUE TO COMPLY WITH SECTION 226 WOULD VIOLATE THE DORMANT COMMERCE CLAUSE.

As is evident from Plaintiffs' own discussion of the existing wage statement laws across the country, while Plaintiffs claim that the laws do not conflict, compliance with one state's law does not ensure compliance nationwide. Dkts. 60 at 30; 65 at 24. Plaintiffs also confirm that the

[10] The district court's denial of SkyWest's preemption arguments in *Hirst* has no bearing on whether work performed within the federal airspace above a state is considered work performed within that state. That the court held that the Illinois Minimum Wage Law is a generally permissible law not preempted by Congress' regulation of the aviation field, the Airline Deregulation Act, or the Railway Labor Act, did not preclude the court from also holding that when FAs seek to apply that law to their time working in the federal airspace it is an improper extraterritorial application of the law that would also violate the Dormant Commerce Clause. *Hirst v. SkyWest Airlines, Inc.*, 2016 WL 2986978, at **10, n. 13 (N.D. Ill. May 24, 2016).

question of whether legislation may conflict with Section 226 is not theoretical, it is real. States continue to evolve and expand their wage statement laws, most recently in Oregon to require the date of payment, employer's identification number and the basis by which the employee is paid, to create new requirements that Section 226 does not include. Dkt. 63 at 25. As a result, a Section 226-compliant wage statement has not and still does not comply with the requirements of all other states.

Plaintiffs also ask the Court to apply the California Labor Code to every day and pay period they worked, including those times when they worked entirely outside of California in other states. They insist that the cases they cite permit the California Labor Code to have a nationwide reach and give California the power to determine how Plaintiffs should have been treated with respect to their employment in any jurisdiction. However, unlike in *Huron Portland Cement Co. v. City of Detroit, Mich.*, there are competing local regulations here, and local governments do impose differing wage statement requirements. *Compare Huron Portland Cement*, 362 U.S. 440, 448 (1960) ("The record contains nothing to suggest the existence of any such competing or conflicting local regulations."). Similarly, unlike in *Pacific Merchant Shipping Association v. Goldstene*, Plaintiffs are attempting to regulate the wage statements for work performed in other states; arguing that Section 226 governed their wage statements whenever they worked in California during a pay period no matter where else they worked. *Compare Goldstene*, 639 F.3d 1154, 1180 (9th Cir. 2011) (recognizing that the Court was "not currently confronted with a state attempting to regulate conduct in either another state of the union…, in the territory or waters of a foreign nation…, or in the open ocean waters."). Permitting California (or any other state) to regulate conduct occurring entirely outside of the state only because Plaintiffs touched California is an excessive burden imposed on interstate commerce and improper projection of California law into other states. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (finding that the Illinois Business Takeover Act violated the Dormant Commerce Clause because, *inter alia*, it purported to give Illinois the ability to regulate tender offers anywhere in the United States); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (holding that California's Resale Royalty Act impermissibly regulated wholly out-

of-state conduct because it regulated art sales where the seller resides in California and no other connection to California existed); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986).

Plaintiffs further argue that their Section 226 rights accrue anew each and every pay period and, thus, ostensibly, at a minimum, they should have received a Section 226-compliant wage statement during those scarce pay periods in which they principally worked in California. This alternative theory only further highlights the Dormant Commerce Clause implications that would result from applying Section 226 to this mobile workforce. Plaintiffs identify a single pay period for Reid when she only worked in California – February 16 through 28, 2013 – and none for Booher throughout the purportedly extended statute of limitations period. Dkt. 65 at 13.[11] A review of Reid's subsequent pay periods demonstrates the impracticality of Plaintiffs' theory. From March 1 through 15, 2013, Reid was on duty for 45.53 hours, including 8.17 hours (17.9 percent) in California and at least 10.25 hours in Florida (22.5 percent). Dkt. 63-9 at 42-43. In the following pay period, Reid's connections to California further decreased, as Reid was on duty a mere 1.57 hours out of 39.25 total hours (4 percent) in California, as compared to 5.13 hours (13 percent), 4.58 hours (11.7 percent) and 2.57 hours (6.6 percent) in New York, Florida, and Massachusetts, respectively, as well as additional time in Texas. Dkt. 63-9 at 43-44. Moreover, half of her workdays that pay period were spent entirely outside of California. *Id.* Even if JetBlue was required to provide Reid with a Section 226-compliant wage statement for the February 16 through 28, 2013 pay period because according to Plaintiffs she principally worked within California, the same cannot be said for these subsequent pay periods where she was on duty as much as *96 percent* of her hours *outside* of California.

Regardless of whether Plaintiffs seek a single wage statement covering all work performed in a pay period or individual wage statements for each jurisdiction in which Plaintiffs

[11] Plaintiffs identify four additional pay periods, none of which fall within the Section 226 statute of limitations period and all of which are for Reid. Plaintiffs again omit Booher from their analysis. Nonetheless, Reid did not work solely in California during any of those periods, as they required Reid to work in either: (a) the federal airspace (May 1 through 15, 2013); or (b) another state, which Plaintiffs either admit (August 1 through 31, 2011; January 16 through 31, 2013) or conveniently ignore (July 16 through 31, 2011). Dkt. 65 at 13-15; Dkt. 63-9 at 7-9, 40, 46-47.

worked during a pay period, the resulting burden on JetBlue would be excessive.[12] *Ward*, 2016 WL 3906077, at *5 (holding that the burden on United to "monitor the pilot's precise hours spent working in each state and determine which state's laws applied in that bid period" along with the confusion resulting from inconsistent wage statement formats on a pay period basis outweighs the local benefits of Section 226); *see also Hirst*, 2016 WL 2986978, at *10 (holding that "tracking the minute-by-minute location of each [Flight Attendant] on each operating SkyWest flight to determine the precise moment she enters and exits [Illinois] airspace" would impose a substantial burden on interstate commerce).

## V. APPLYING THE CALIFORNIA LABOR CODE'S DAILY OVERTIME REQUIREMENTS TO FA'S PLACES AN UNDUE BURDEN ON JETBLUE.

In *Sullivan II*, the Ninth Circuit recognized that a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 662 F.3d at 1271.[13] Plaintiffs claim there is no burden here, because "JetBlue can identify four-legged California duty periods through its own records." Dkt. 65 at 23. That argument ignores that the existence of such a duty period, even if it requires more than eight hours in a day, does not automatically trigger Section 510, because FAs must still work more than eight hours *in*

[12] Plaintiffs' proposal that JetBlue can simply have FAs "punch time clocks on their inflight tablets during their shifts" only increases the burden and would interfere with the FAs' performance of their inflight duties. Dkt. 65 at 23, n. 12. JetBlue would have to implement a mechanism through which FAs are notified of the exact time at which they cross over a state's territorial boundaries so that they can stop performing their duties and record that time.

[13] While the Ninth Circuit failed to perform the required analysis in *Sullivan II*, nothing in that decision nor its decision in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), created the test Plaintiffs seek to impose here – that there must be conflicting overtime law for Section 510 to violate the Dormant Commerce Clause. Dkt. 65 at 24. Nor is the Ninth Circuit's analysis in *Corey* applicable here. There, the plaintiffs-appellees contended that California's Low Carbon Fuel Standard violated the Dormant Commerce Clause and was preempted by the Clean Air Act. 730 F.3d at 1077. While the Clean Air Act expressly prohibited state regulation of emissions from motor vehicles, it explicitly exempted California from that prohibition and Congress encouraged California to "act as a kind of laboratory for innovation." *Id.* at 1078-79 (citing *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.3d 1095, 1111 (D.C. Cir. 1979). There is no such exemption here permitting California to apply its overtime laws extraterritorially to work performed outside its territorial boundaries. Indeed, the Court recognized in *Corey* that California "cannot peacefully impose its own regulatory standards on another jurisdiction." *Id.* at 1104.

*California* to receive daily overtime. While the FAA requires JetBlue to maintain certain data and JetBlue tracks the amount of FAs are on duty, it does not track the amount of time FAs spend working on the ground in California (or in any other state) in its normal course of business. Accordingly, to determine here whether Plaintiffs actually worked more than eight hours *in California* on the days Plaintiffs identified, which they did not, JetBlue was required to retain a statistical expert to synthesize the various datasets, including Plaintiffs' report, taxi, and deplaning times, as well as the wheels-off and wheels-on times for each flight they worked. *See* Dkt. 63-20. Dr. Estevez's ability to perform this analysis, however, does not eliminate the excessive burden of having to monitor each FA's precise hours worked and the location thereof to determine when and how each state's laws applies. *See Ward* 2016 WL 3906077, at *5-6.

This burden increases substantially when considering the far-reaching implications of Plaintiffs' contentions. While Plaintiffs assert that they are not seeking to recover for days in which they worked flights that flew above California without landing in the state, no amount of artful pleading can avoid the reality of Plaintiffs' demand. But Plaintiffs are not "bas[ing] their overtime claims on 'entire days' worked in California." Dkt. 65 at 23 (citing *Sullivan I*, 51 Cal. 4th at 1200). Rather, for every single day that Plaintiffs claim they are owed overtime pay, they only worked more than eight hours in California if this Court finds that time working in the federal airspace above California is the equivalent of time working in California. If that is the law, it applies whether or not a flight departs from or arrives at a California-based airport. The second the airplane travels above California's territorial boundary, under Plaintiffs' theory the FA is working in California and must be treated as a California employee for the entirety of his or her pay period. As a result, JetBlue would not only need to track the amount of time in the air in each state, but also the exact location of each flight throughout its route, to determine whether and when California (and any other state) law would apply. *Hirst*, 2016 WL 2986978, at *10; *Ward*, 2016 WL 3906077, at *5. The undue burden imposed by such requirements precludes applying Section 510's pay requirements to Plaintiffs.

## VI. JETBLUE'S WAGE STATEMENTS ACCURATELY REFLECTED JETBLUE'S CALIFORNIA-COMPLIANT COMPENSATION SYSTEM.

In an effort to re-litigate their previously adjudicated and dismissed minimum wage claim, Plaintiffs again rely on mischaracterizations and purported contradictions. For the fourth brief in a row, Plaintiffs claim that JetBlue paid them $0 for certain hours of work and now allege that their wage statements failed to include these fictitious payments. However, this Court already found that JetBlue's compensation formulas "expressly consider[ed] all hours worked in the first instance" and ensured "that Plaintiffs [were] paid for all hours worked." *Booher*, 2016 WL 1642929, at *3.

There is nothing contradictory between JetBlue's positions (a) that its credit-based compensation system ensures Plaintiffs were paid well above the minimum wage for each hour worked in compliance with California law, and (b) that system is not an *hourly* system in which Plaintiffs are paid a set hourly rate for each hour worked. That JetBlue's credit-based system permits Plaintiffs (and the Court) to determine that Plaintiffs earned well-above the minimum wage for each hour worked does not mean that JetBlue's system is thus an hourly system. Indeed, as this Court previously recognized, "JetBlue pays its flight attendants according to one of the four formulas for all time on duty," and it does not use a set hourly wage for every task FAs perform. *Booher*, 2016 WL 1642929, at *2; *see also Oman v. Delta Air Lines, Inc.*, 153 F. Supp. 3d 1094, 1095 (N.D. Cal. 2015). Notwithstanding this credit-based system, through the information JetBlue provided, Plaintiffs "can easily calculate their rate of pay for the mix of responsibilities they would have during [each] Rotation." *Booher*, 2016 WL 1642929, at *3.

JetBlue accurately reported Plaintiffs' earnings under this credit-based system in good faith on each wage statement. Plaintiffs do not dispute that they received wage statements at the time of each payment of wages or that those wage statements accurately listed each form of compensation with which they were credited and the pay rate associated with each in accordance with JetBlue's California-compliant compensation system. Nor do they dispute that they could not "easily calculate their rate of pay" from the information available to them through the wage statements and JetBlue's Rainmaker system. Rather, years after their employment ended, they

contend that JetBlue technically violated the law because it did not transcribe Plaintiffs' credits into an hourly equivalent even though that hourly equivalent would not accurately reflect the manner in which JetBlue paid Plaintiffs.

## VII. PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY WERE WORKING THROUGHOUT THE TIME THEY WERE CONSIDERED ON DUTY.

In addition to assuming that time worked in the federal airspace over California should be included as time worked in California, Plaintiffs mistakenly assume that their time on duty pursuant to the FAA's regulations is the equivalent of hours worked under California law. For purposes of determining when FAs are permitted to work and when they are required to rest, the FAA mandates that all time between report to release, including Turn time, be treated as "on duty" time, regardless of whether the FAs are actually performing work throughout that period. 14 C.F.R. § 121.467(a). Accordingly, JetBlue was required to count all of Plaintiffs' time during a Duty Period (not a Rotation, which includes layover time) as duty time.

However, as Plaintiffs admitted, they were not always working while "on duty." On Turns exceeding one hour, Plaintiffs did not have any job duties and generally were free to do whatever they wanted, such as eat, shop or watch a movie. Dkt. 63 at 11-12. That Plaintiffs could not watch a "vulgar" movie while they were "killing time" (Dkt. 63-3 at 29) does not convert otherwise non-working hours into working hours. Nor does the FAA's prohibition of an FA performing any duties within eight hours of using alcohol. 14 C.F.R. § 120.37(d)(1).

JetBlue has produced all of the necessary records to allow Plaintiffs to determine when they were "on duty," when they were working inflight, and their time before, after, and between flights. Moreover, JetBlue produced available flight path records matching prior testimony that certain intra-California flight routes primarily flew over the Pacific Ocean. Dkt. 63 at 31. Plaintiffs do not contend that any of these records are "incomplete" or "inaccurate." As a result, it is their burden to prove that they have in fact worked more than eight hours in a day in California without receiving proper compensation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Because Plaintiffs have not done so, their Section 510 claim should be dismissed.

## VIII. PLAINTIFFS' WAITING TIME PENALTIES, UNFAIR COMPETITION LAW AND PAGA CLAIMS LACK MERIT.

Plaintiffs' argument that "JetBlue did not enter any evidence or provide any argument that its violations were not willful" and thus "has waived any independent basis for opposing Plaintiffs' waiting time claim," relies on a Ninth Circuit decision regarding what a party may raise on appeal[14] and disregards arguments in JetBlue's opening brief. As set forth again above, JetBlue has complied with Section 226 in good faith by providing Plaintiffs with wage statements that accurately reflected the manner in which they were paid in accordance with JetBlue's California-compliant FA compensation system. Moreover, because time spent working in the federal airspace does not qualify as California work time for Section 510 purposes, there was not a single instance during Plaintiffs' employment when they worked more than eight hours in a day in California. Accordingly, JetBlue should not be found to have willfully failed to pay all wages due.

Further, because Plaintiffs' underlying wage statement and overtime claims fail, Plaintiffs' Third, Fifth and Sixth claims, under California Labor Code sections 201-203, California's Business & Professions Code sections 17200 *et seq.*, and PAGA – the latter two of which Plaintiffs do not even address in their reply – must fail as well.

## IX. CONCLUSION

For all the reasons set forth in JetBlue's initial moving papers and this Reply, JetBlue's cross-motion should be granted, Plaintiffs' cross-motion should be denied, and Plaintiffs' remaining claims should be dismissed with prejudice.

Dated: April 14, 2017

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[14] The decision in *Abogados v. AT&T, Inc.* found that a party cannot raise an argument *on appeal* that it did not raise at the district court level. 223 F.3d 932, 937 (9th Cir. 2000).